IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

State of Rajasthan Vs. Sohaniya
(1) D.B.CRIMINAL MURDER REFERENCE NO.01/2005

Sohaniya & Ors. Vs. State of Rajasthan
(2) D.B.CRIMINAL APPEAL NO.651/2005

Against the judgment dated 30.7.2005
passed by the Special Judge, NDPS Act Cases, Pratapgarh,
in Special Sessions Case No.50/2001.

Date of Judgment: May 31,2007

P R E S E N T

HON'BLE MR. JUSTICE SATYA PRAKASH PATHAK
HON'BLE MR. JUSTICE DEO NARAYAN THANVI

Mr. C.S.Joshi)
Mr. Sandeep Mehta)
Mr. Amitabh Acharya) for the appellants.

Mr. V.R.Mehta) Public Prosecutor.

BY THE COURT : (PER HON'BLE MR. THANVI, J.)

1. This Murder Reference for confirmation of death sentence awarded to accused Sohaniya for having committed the offence under Section 396 IPC has been submitted by the learned Special Judge, N.D.P.S. Cases, Pratapgarh in Special Sessions Case No.50/2001 - State Vs. Sohaniya & Others. Accused

Sohaniya and six other accused appellants have also filed D.B.Criminal Appeal No.651/2005, against their conviction & sentences for the various offences as under:

1. U/SEC. 120B IPC	Sentenced to 5 Years' R.I. & to pay a fine of Rs.1000/- & in default, to further undergo one year's S.I.
2. U/SEC. 148 IPC	Sentenced to 3 years' R.I. & to pay a fine of Rs.1000/- & in default, to further undergo one year's S.I.
3. U/SEC. 395 IPC OR IN ALTERNATIVE SEC. 395/149 IPC	Sentenced to imprisonment for life & to pay a fine of Rs.5000/- & in default, to further undergo one year's S.I.
4. U/SEC. 396 IPC	**(1) Accused Sohaniya:** Sentenced to death and to pay a fine of Rs.1000/-; **(2) Accused Nahar Singh, Ratadiya @ Radhey Shyam, Sunder, Fateh Lal @ Fatta Lal, Kusaliya & Lal Chand:** Sentenced to imprisonment for life & to pay a fine of Rs.5000/- & in default, to further undergo one year's S.I.
5. U/SEC. 397 or 397/149 IPC	Sentenced to 7 years' R.I. & to pay a fine of Rs.1500/- & in default, to further undergo six months' S.I.

6. U/SEC. 458 or 458/149 IPC	Sentenced to 10 years' R.I. & to pay a fine of Rs.2000/- & in default, to further undergo one year's S.I.
7. U/SEC. 459 or 459/149 IPC	Sentenced to imprisonment for life & to pay a fine of Rs.5000/- & in default, to further undergo one year's S.I.
8. U/SEC. 460 or 460/149 IPC	Sentenced to imprisonment for life & to pay a fine of Rs.5000/- & in default, to further undergo one year's S.I.
9. U/SEC. 380 or 380/149 IPC	Sentenced to 7 years' R.I. & to pay a fine of Rs.500/- & in default, to further undergo six months' S.I.
10. U/SEC. 323 OR 323/149 IPC	Sentenced to one year's R.I. & to pay a fine of Rs.200/- & in default, to further undergo one month's S.I.
11. U/SEC. 324 OR 324/149 IPC	Sentenced to 3 years' R.I. & to pay a fine of Rs.500/- & in default, to further undergo six months' S.I.
12. U/SEC. 325 OR 325/149 IPC	Sentenced to 5 years' R.I. & to pay a fine of Rs.1000/- & in default, to further undergo one year's S.I.
13. U/SEC. 326 OR 326/149 IPC	Sentenced to 10 years' R.I. & to pay a fine of Rs.2000/- & in default, to further undergo one years' S.I.
14. U/SEC. 302 OR 302/149 IPC	Sentenced to imprisonment for life & to pay a fine of Rs.5000/- & in default, to further undergo one year's S.I.

15. U/SEC. 8 READ WITH SECTION 18 OF N.D.P.S. ACT	Sentenced to 10 years' R.I. & to pay a fine of Rs.1,00,000/- & in default, to further undergo one year's S.I.

2. Since both the Murder Reference and the Criminal Appeal arise out of the same judgment of the learned Special Judge, therefore, they are being disposed-of by this common judgment.

3. The brief facts are that on the night of 19.3.2001, Amar Singh, S.H.O., Pratapgarh, (PW 58) received a telephonic message about firing at Village Dhanesree, Police Station Pratapgarh District Chittorgarh and on reaching the spot, obtained a written report at 4.00 A.M. on 20.3.2001 from one Suresh Chandra S/o Chain Ram Bhambi that in the preceding night at 10.30 PM when he was sleeping in his house alongwith his family members, he heard the noise in the adjoining house of his uncle Nanu Ram and saw from the roof that four notorious persons having axes in their hands, were breaking the door of his uncle's house. Two persons having rifles in their hands, were standing outside the house of his uncle and were continuously firing. His father and elder brother Shantilal also came on the roof of the house. Some of the notorious persons were firing in the village and were exhorting to plunder the property and to kill, on cry. When he started shouting from the roof of his house,

5-6 assailants came on the roof from the front and rear side of his house. Upon this, he and his brother ran away but the assailants caught hold of his father and inflicted lathi and axe blows. On return, he found his father unconscious and noticed an injury on his head. His wife, sister-in-law Sangeeta and mother Parvati told that the assailants had taken opium, gold and silver ornaments alongwith Cash by threatening them. Upon enquiry, it was also revealed that the assailants had entered into the house of Nirbhay Ram and took away the opium and gold and silver ornaments from his house. By this act of the assailants, Nirbhay Ram, Mangilal, Chain Ram, Shiv Ram, Jagdish, Mahesh and Prakash received more injuries and were sent to Pratapgarh Hospital, where Nirbhay Ram died. He also received firearm injury on the right side of his back. Assailants, between the age group of 20-30 years speaking in strict language, were 15-20 in number having rifles, lathis, swords etc. with them and were wearing pants, bushirts, `dhoti' and `kameej'. The empty cartridges were lying outside his & his uncle's house.

4. On the basis of this report, which was sent at the police station, Pratapgarh with constable, a regular F.I.R. (Ex.P.47) was registered and investigation was commenced. During the course of investigation, site map was prepared and injured were medically examined. Injured Nirbhay Ram died in the hospital at

Pratapgarh itself and two more injured viz; Chain Ram and Prakash were sent for treatment at Udaipur Hospital, where they also died. Empty cartridges were seized from the spot alongwith one Shawl. The footprints were also lifted and moulds were got prepared. While the investigation was in progress, a secret information was received regarding whereabouts of assailants, who were said to be "Kanjar" by caste of village Tokda in district Jhalawar and accordingly the investigating team headed by G.L.Meena, Addl.S.P. Reached there and arrested accused Sohaniya, Nahar Singh, Ratadiya, Sunder, Fatehlal, Kushaliya and Lal Chand on 1.5.2001 from the bushes of Kshipra river at village Tokda, where they were sitting with weapons. While the accused were under arrest, they furnished information on the same day regarding weapons they used during the commission of crime at village Dhanesree and in pursuance to the information, recoveries were effected from the huts of accused appellants at Village Tokda of district Jhalawar. These seven accused appellants were also put to identification parade before the learned A.C.J.M., Pratapgarh on 4.5.2001 before ten witnesses viz; Dinesh (PW 12), Suresh (PW 13), Mahesh (PW 16), Shantilal (PW 18), Chandmal (PW 20), Sav Ram (PW 3), Hiralal (PW 4), Devilal (PW 27), Nanu Ram (PW 29) and Bhagwati Lal (PW 26). Similarly, while they were under arrest, they also furnished information on 8.5.2001 and in pursuance to

these informations, the recovery of opium and ornaments were also made from their Village Tokda on 9.5.2001. Thereafter, all the seven accused appellants also furnished further informations and in pursuance to it, investigating Officer Kalyan Singh (PW 55) proceeded to identify the spot and consequently the spot was identified on 12.5.2001 and site inspection memos Ex.P.102 and Ex.P.103 were prepared. These accused also furnished information about the spot, where they kept tractor trolley on 14.5.2001, in which they reached at the place of crime and used motor cycles. During investigation, accused Balwant Singh and Phunda Singh were also arrested, who were the owner of the tractor trolley in which the accused persons reached at the spot. Likewise, accused Laxman was also arrested. Motor cycle was also recovered which was used during the commission of crime. During investigation, it was also revealed that accused Sohaniya, Lal Chand and Phunda Singh came to village Dhanesree 2-3 days prior to the incident and crime was committed by the gang of these seven accused-appellants alongwith accused Balwant Singh, Phunda Singh, Laxman, Goliya, Gajrala, Sajaniya, Mithu, Ramprasad, Ramsingh, Lachhiya, Bhuriya, Kela, Jharmariya, Raja Babu, Gumaniya, Jaswantiya and Elam Singh. The recovered articles and footprints moulds were sent for chemical examination.

5. After usual investigation, all the seven accused appellants alongwith Balwant Singh were chargesheeted for the offence u/ss.395, 396, 397, 458, 459, 460, 380, 326 and 120B IPC and Section 8/18-29 of the N.D.P.S.Act, 1985, hereinafter referred-to at "the Act of 1985" and against rest of the accused, challan was filed under Section 299 CrPC. After hearing the arguments on charges, accused Sohaniya, Nahar Singh, Ratadiya, Sunder, Lal Chand, Fatehlal, Kushaliya and Balwant singh were charged under sections 120B, 148, 395 or in alternate 395/149, 396, 397 or in alternate 397/149, 458 or 458 read with 149, 459 or 459/149, 460 or 460/149, 380 or 380/149, 323, 324, 325, 326 read with 149, 302 or 302/149 IPC and 8/18 of the Act of 1985 and accused Balwant singh under Section 8/29 also of the Act of 1985. On arrest of accused Phunda Singh on 18.12.2001, supplementary chargesheet was filed on 18.12.2001 and like Balwant Singh, he was also charged for the above offences of the I.P.C. and the Act of 1985. Likewise, on arrest of accused Laxman, Lachhiya alias Laxmi Narain and Elam Singh, supplementary chargesheet was filed on 1.8.2002 and they were chargesheeted under the above offences of the I.P.C. and Section 8/18 of the Act of 1985. Accordingly the charges were explained to the above twelve accused, to which they pleaded not guilty. The prosecution examined 58 witnesses viz; Kanhaiyalal (PW 1), Ramprasad (PW 2), Sav Ram (PW 3), Hiralal

(PW 4), Smt.Madhu (PW 5), Amar Singh (PW 6), Raghu Singh (PW 7), Kamal Singh (PW 8), Shantilal (PW 9), Khemraj (PW 10), Mangilal (PW 11), Dinesh (PW 12), Suresh (PW 13), Tara Chand (PW 14), Amrit Ram (PW 15), Mahesh (PW 16), Munnalal (PW 17), Shantilal (PW 18), Khemraj s/o Hari Ram (PW 19), Chand Mal (PW 20), Nand Ram (PW 21), Ram Chandra (PW 22), Smt.Nirmala (PW 23), Smt.Saddam Bai (PW 24), Smt.Parvati (PW 25), Bhagwati Lal (PW 26), Devilal (PW 27), Hiralal (PW 28), Nanu Ram (PW 29), Mangilal (PW 30), Jagdish (PW 31), Shantilal (PW 32), Basantilal (PW 33), Hiralal (PW 34), Narendra Kumar (PW 35), Daulat Singh (PW 36), Ajay Kumar Sharma (PW 37), Jagdish (PW 38), Harak Chandra (PW 39), Shambhu Singh (PW 40), Dr.Vimal Chandra Gandhi (PW 41), Samrath Lal (PW 42), Smt.Ganga Bai (PW 43), Lal singh (PW 44), Bhanwar Singh (PW 45), Bharat Singh (PW 46), Devilal (PW 47), Vimal Kumar (PW 48), Rishabh Kumar (PW 49), Smt.Sangeeta (PW 50), Smt.Munni Bai alias Dev Bai (PW 51), Shankerlal (PW 52), Jamna Lal (PW 53), Sohanlal (PW 54), Kalyan Singh (PW 55), Dr.Rahul Jain (PW 56), Govardhanlal (PW 57) and Amar Singh (PW 58). The statements of accused were recorded under Section 313 CrPC. They produced Badri Singh (DW 1) and Jhujhar Singh (DW 2) in their defence.

6. After hearing arguments, learned trial Judge convicted and

sentenced all the seven accused appellants in the manner as aforesaid but acquitted accused Balwant Singh and Laxmi Narain alias Lachhiya of all the charges framed against them but convicted accused Phunda singh and Laxman under Section 411 IPC and sentenced to punishment, which they have already undergone. For rest of the charged offences, they were acquitted. During trial, accused Elam Singh was declared absconded vide ordersheet of the trial court dt.28.4.04.

7. We have heard learned counsel for the appellant and the learned Public Prosecutor at length and carefully scrutinized the oral and documentary evidence on record.

8. While assailing the judgment of the learned trial Court on the conviction of accused appellants, Mr.Joshi, learned counsel, has mainly stressed to falsify the recoveries made by the police and the manner in which test identification parade was conducted by the learned magistrate of the seven accused appellants. According to him, there was no light on the night of 19.3.2001 and the accused were belonging to different district, which is far away from the place of occurrence and there was no special mark of identification on the body of accused and ornaments. The identification parade has been conducted about one and half months after the date of incident and the accused

were shown to the witnesses prior to the incident as is evident from the testimony of S.H.O. Amar Singh (PW 58) himself. According to him, the recoveries of weapons of offence, ornaments and opium are also most suspicious, accused were already having arms with them when they were arrested and the recoveries made from the huts of the accused by digging soil but there was no mark of soil etc. on the recovered articles. According to him, the incident is of March, 2001 and the recoveries have been made in the month of May, 2001 and, as such, these recoveries were not soon after the incident. He has further stressed that the opium which is said to have been recovered from the possession of the accused was not the same, because the requisite morphine was not found in the samples and there was non-compliance of the mandatory provisions of Sections 42, 50, 55 & 57 of the Act of 1985. He has also argued that there was news in the local Newspaper of Mansaur District that certain plunderers took opium from the village Dhanesree and when this opium was not recovered, the police to save its own skin, implicated the accused appellants falsely. While drawing attention of the court on the evidence of eye witnesses, learned counsel argued that many of the witnesses have turned hostile and some of them have wrongly identified the accused persons, while some witnesses, who have identified the accused at the test identification parade or in the court dock, have given

contradictory and un-corroborative versions. The footprints of the accused taken on the spot were not obtained with the orders of the magistrate and the witnesses of the locality were not associated-with at the time of recovery. The theory of prosecution that the accused came to village Dhanesree two to three days prior to the incident on tractor and motorcycle, has been disbelieved by the trial court. While drawing attention of the court on oral and documentary evidence led by the prosecution, learned counsel has strongly submitted that the entire investigation is fabricated and does not inspire confidence, which reveals that the investigating agency has not collected the evidence but created it to falsely implicate the accused appellants. He has further argued that the case of the accused appellant Sohaniya is not distinct from the other six accused, who have been sentenced to life imprisonment but even then the trial Court has awarded the death sentence to the accused appellant Sohaniya merely on the ground that he has already been previously convicted in the murder case, the appeal against which is pending in this court at Jaipur bench.

9. In support of his contentions, learned counsel for the accused appellants has placed reliance on the cases viz; (i) Dhonkal singh v. The State reported in 1954 R.L.W. p.154; (ii) Gul Singh v. State of M.P. reported in 1974 Mh.L.J. p.16; (iii)

Moti v. State of U.P. reported in 2003 SCC (Cri) 1821; (iv) Gabsingh v. State of M.P. reported in 2004 (2) EFR 514; (v) Nachhettar Singh v. State of Punjab reported in AIR 1976 SC 951; (vi) Bharat v. State of M.P. reported in AIR 2003 SC 1433; (vii) Harjit Singh v. State of Punjab reported in 2002 SCC (Cri) 1518; (viii) Salim Akhtar alias Mota v. State of Uttar Pradesh reported in AIR 2003 SC 4076; (ix) Prem Prakash Mundra v. State of Rajasthan reported in 1998 CrLR (SC) 135; and (x) Bhugdomal v. State of Gujarat reported in AIR 1983 SC 906.

10. On the other hand, learned Public Prosecutor while supporting the conviction of the accused appellants, has argued that the present case of dacoity and murder, wherein three persons were killed and many received injuries, who were the opium cultivators and the accused persons with an intention to commit dacoity of opium and ornaments, made a pre plan to search their houses at Dhanesree and reached there with a gang of 20-25 persons from village Tokda, which is about 100 kms. from the place of occurrence and fled from the spot after committing the crime. After extensive search, the police arrested them from their own village Tokda, District Jhalawar and in pursuance to their information during custody, the recoveries of weapons used in the commission of crime, were made and they were soon put for identification parade before the learned

magistrate. While in custody, the accused persons also furnished information to the investigating officer regarding opium and ornaments and the same were recovered at their instance, which have been identified by the prosecution witnesses before the magistrate, who conducted the test identification parade and in the court as well. According to the learned Public Prosecutor, in the present case, there are 25 eye witnesses, who were examined by the trial court and if some of them have not supported the prosecution case and there appears to be any infirmity in their statements, it cannot be said to be a ground for rejecting the entire evidence of the prosecution, because such infirmities are bound to occur when the witnesses are uneducated villagers. He has further argued that the accused Sohaniya was the leader of gang against whom many criminal cases are pending in various courts and has also previously been convicted in a murder case, therefore, the trial court has rightly awarded him the death sentence.

11. Out of 58 witnesses examined during the trial, there are 25 eye witnesses, who have seen the commission of crime by the accused appellants. Out of these 25 witnesses, six witnesses viz; Madhu (PW 5), Munnalal (PW 17), Khemraj (PW 19), Nand Ram (PW 21), Ram Chandra (PW 22) and Sangeeta (PW 50) have supported the story of the prosecution regarding commission of

crime of dacoity but they have not identified the accused persons, because soon after the incident, Munnalal (PW 17) and Khemraj (PW 19) left the place and went to Village Selarpura and Nand Ram (PW 21) and Ram Chandra (PW 22), who received injuries, have not been medically examined. Therefore, the evidence of these six eye witnesses does not connect the accused with the commission of crime. It is an admitted fact that deceased Nirbhay Ram died on the spot and his post mortem report Ex.P.124 has been proved by Dr.Vimal Chandra Gandhi (PW 41). Likewise, the post mortem report (Ex.P.237) of deceased Chain Ram and the post mortem report (Ex.P.238) of deceased Prakash have been proved by Dr.Rahul Jain (PW 56). Rest of the six injured eye witnesses were examined by Dr.Gandhi. They are namely Amrit Ram (PW 15) who was examined vide Ex.P.126 received one firearm injury; Nanu Ram (PW 29) who was examined vide Ex.P.127 received six firearm injuries and one incised wound of simple nature with sharp edged weapon; Suresh (PW 13) who was examined vide Ex.P.128 received one firearm injury; Jagdish (PW 31), who was examined vide Ex.P.129 received three firearm injuries; Mangilal (PW 30) who was examined vide Ex.P.130 received two injuries with blunt weapon and one firearm injury; and Sav Ram (PW 3) who was examined vide Ex.P.133 received four injuries, out of which three were simple in nature and as to fourth injury,

opinion was reserved because of the x-ray report & plates, which is not on the file. According to doctor, while examining injury, he kept the opinion reserved with regard to injury being simple or grievous in nature but there is no record in the file relating to x-ray report and plates or the evidence of the doctor, who conducted the x-ray, that the said injuries were of grievous nature. In the absence of evidence regarding injuries being of grievous nature, the conviction under Sections 325 and 326 IPC cannot be recorded. We are unable to understand as to how the learned trial Judge has come to the conclusion about the guilt of the accused for inflicting grievous injuries on the person of above injured, when there is no evidence to this effect. Of-course, the injured have stated in their statements that they received injuries with axe, firearms and lathis and have also identified the accused. Amongst these injured, Sav Ram (PW 3) has identified all the accused in the court and Suresh (PW 13) is the witness of giving First information report Ex.P.47 to the police on the spot, who has also identified the accused in the court. Likewise, Amrit Ram (PW 15) has identified the accused in the court. Injured Nanu Ram (PW 29), who was put for identification parade, has identified only accused Sohaniya in the court, who fired upon him. Injured Mangilal (PW 30) has specifically identified all accused appellants by specifying accused Sohaniya and Lal Chand, who were present in the court dock, whereas injured

Jagdish (PW 31) identified only accused Nahar Singh. In this way, these six injured witnesses have also identified accused in the Court. Amongst them, Sav Ram (PW 3) and Suresh (PW 13) have also identified the accused during test identification and in the Court.

12. Apart from these six injured eye witnesses, other witness who had seen the occurrence is Hiralal (PW 4), who has identified all the seven accused appellants during the test identification parade as well as in the court. Madhu (PW 5), who has identified stolen chain in the court, has stated that she can identify the accused on seeing but no question was put to him whether the accused present in the court were the same or not. Dinesh (PW 12), Mahesh (PW 16), Shantilal (PW 18) and Chand Mal (PW 20) have also identified the accused appellants in the court as well as during the test identification parade. Tara Chand (PW 14), Smt.Nirmala (PW 23) and Smt.Saddam Bai (PW 24) have also identified the accused in the Court. Smt.Parwati (PW 25) has only identified accused sunder, who snatched "Mangal Sutra" and a watch from her. She did not identify rest of the accused persons. Bhagwati Lal (PW 26) who was put for identification parade, has only identified accused Sohaniya in the Court. Devilal (PW 27) was put for identification parade and has identified four accused in the court viz; Nahar Singh who fired at

his father, Sunder who inflicted lathi blow on him, Laxmi Narain who broke open the door of the house and accused Sohaniya who fired on the spot. Smt.Ganga Bai (PW 43) has identified accused Laxman who fired at Nirbhay Ram and Laxmi Narain, who took off her ornaments from her neck and ears but they have been acquitted. However, she has identified five accused appellants viz; Radhey Shyam alias Ratadiya, Lal chand, Laxman, Fatehlal and Sunder in the court. Sangeeta (PW 50) has not identified any accused, whereas Munni Bai (PW 51) has identified all the accused. Likewise as stated above, Munnalal (PW 17), Khemraj (PW 19), Nand Ram (PW 21) & Ram Chandra (PW 22) have not identified the accused in the Court.

13. In this way, out of 25 eye witnesses including the injured, six witnesses have not identified all or some of the accused appellants and from remaining 19 eye witnesses, 10 were put for test identification and also identified in court including four injured viz; Sav Ram (PW 3), Suresh (PW 13), Nanu Ram (PW 29) and Jagdish (PW 31). Injured Amrit Ram (PW 15) and Mangilal (PW 30) were not put for test identification. Thus, it is evident from the evidence of these witnesses that a gang of 20-25 persons in number came to village Dhanesree, Police Station Pratapgarh, District Chittorgarh, on the night of 19.3.2001 for committing dacoity and they fired at the villagers, wherein many

persons sustained injuries and three were died. These accused also plundered ornaments and opium from the houses of Nirbhay Ram and Chain Ram and created an atmosphere of terror in the village and ran away after committing crime. Now, the question for consideration is whether the conviction of these seven accused appellants recorded by the trial Court is in conformity with the evidence on record or not.

14. To judge the credibility of an eye witness with regard to identification of the accused, ornaments, opium and other stolen properties, the Courts take into account the sound principles of the Criminal Jurisprudence, which are based on the test identification, recoveries, footprint marks etc., to substantiate the direct evidence. These are defined as of the relevancy of facts under Chapter II and existence of certain facts by way of presumption under Chapter VII of the Indian Evidence Act. Section 9 of the Evidence Act which defines facts necessary to explain or introduce relevant facts, says that if any fact which establishes the identity of any person or thing, whose identity is relevant, is admissible. This is commonly known as test identification proceedings, which is conducted mainly for two reasons; firstly for the satisfaction of the investigating officer regarding the bonafides of an eye witnesses and secondly reliability of the witness is confirmed by the court when they are

put through the process of test identification proceedings before a magistrate or other independent persons. The procedure of test identification is that it should be conducted as far as possible immediately after the arrest of the accused so that the memory of an identifier remains fresh and there should be no special mark on the face or body of the accused persons and identifier may not have any opportunity to see the things or persons to be identified before it is held. This evidence of test identification is supporting to the substantive one.

TEST IDENTIFICATION OF ACCUSED:

15. If, in the above light, the evidence of the present case is scrutinized, 10 out of 25 eye witnesses were put for identification parade before the magistrate on 4.5.2001 at District Jail, Pratapgarh before seven accused appellants, who were arrested at Village Tokda, District Jhalawar on 1.5.2001 vide Ex.P.154 to 160 and were in `Baparda'. They were Sav Ram (PW 3) vide Ex.P.4 to Ex.P.10 in which he has identified all the seven accused appellants except accused Ratadiya in Ex.P.9; Hiralal (PW 4) vide Ex.P.18 to 24 in which he has identified all the accused; Dinesh (PW 12) vide Ex.P.40 to 46 in which he has identified four accused except Sunder in Ex.P.41, Fateh Lal in Ex.P.42 and Ratadiya in Ex.P.46; Suresh (PW 30) vide Ex.P.50 to

56 in which he has identified five accused except Sunder in Ex.P.51 and Nahar Singh (Ex.P.53); Mahesh (PW 16) vide Ex.P.57 to 63 in which he has identified all the accused except Nahar singh in Ex.P.60; Shantilal (PW 18) vide Ex.P.69 in which he has identified all the accused except Nahar Singh in Ex.P.68 and Lal Chand in Ex.P.70; Chandmal (PW 20) vide Ex.P.72 to 78 in which he has identified six accused except Ratadia vide Ex.P.78. Bhagwatilal (PW 26) vide Ex.P.81 to 87 in which he has identified all the accused; Devilal (PW 27) vide Ex.P.88 to 94 in which he has identified four accused except Sunder (Ex.P.89), Nahar Singh (Ex.P.91) and Sohaniya (Ex.P.92); and Nanu Ram (PW 29) vide Ex.P.95 to 101 in which he has identified six accused except Nahar Singh (Ex.P.98). By and large, all the seven accused appellants have been identified by the ten witnesses except wrong identity of one to three accused had been given by the individual witness.

16. Upon perusal of the identification memos, it appears that when accused Sohaniya was put for identification parade before Hiralal (PW 4) vide Ex.P.20, accused Sohaniya stated before the magistrate that he took tea before this witness in the presence of police. Likewise, accused Sohaniya, who was put for identification parade before Suresh PW 13 vide Ex.P.54, told to the magistrate that the police took him to the village and he was

shown there after shaving, where all villagers saw him. Likewise accused Kushaliya and Sunder, who were put for identification parade before Mahesh (PW 16) vide Ex.P.57 and 58 respectively, stated before the magistrate that the police took them to the village, where all villagers saw them. Accused Sohaniya, who was put for identification parade vide Ex.P.61 before witness Mahesh (PW 16), also stated that the police took him to the village, and he was shown there after shaving, where all the villagers saw him. Accused Sohaniya also stated before the magistrate during identification parade vide Ex.P.69 that when the police took him to the village, he was beaten by the witness Shantilal (PW 18). Likewise, accused Sohaniya has also stated that vide Ex.P.76, when he was put before witness Chand Mal (PW 20) for identification parade, he was already shown to the witness by the police in the court and also in the hospital. Accused Sohaniya has also stated in the memo Ex.P.85, when put before eye witness Bhagwatilal (PW 26), that this witness provided water to him in the village. He also stated that vide Ex.P.99, when he was put before witness Nanu Ram (PW 29), he was got down from the jeep by this witness when the police brought to him in the village. In this way, except few discrepancies and version of the co-accused, ten eye witnesses have identified the accused. If among such large number of accused, some of them have not been identified in the court or

during the identification parade by the witnesses, the entire identification parade cannot be disbelieved.

17. The version of three accused viz; Sohaniya, Kushaliya and Sunder that they were shown to the witnesses prior to the identification parade, cannot be accepted as true because firstly this is the version of the accused himself in his defence and secondly, no specific question that they were shown to the witnesses prior to the identification parade at a particular place, date and time, has been put in the cross examination. If the version of the accused is looked-into in the light of the cross examination, Hiralal (PW 4) has stated that the accused Sohaniya of course told to the magistrate that he offered tea to him but it is a wrong version of the accused before the magistrte. No question regarding the identification has been put to witness Suresh (PW 13). Mahesh (PW 16) has denied that the police identified the accused prior to identification parade by bringing them to the village. No question has been put to witness Shantilal (PW 18) and Chand Mal (PW 20) regarding bringing the accused Sohaniya at the village prior to the identification parade. Bhagwatilal (PW 26) and Nanu Ram (PW 29) have denied that the police brought to accused Sohaniya in the village before the identification parade, whereas Nanu Ram (PW 29) has specifically stated in examination-in-chief that the accused

Sohaniya fired upon him. A general statement has been given by some of the witnesses that accused were brought to the village Dhanesree after the incident but these accused were brought at the place of occurrence at Village Dhanesree on 12.5.2001 in pursuance to the information furnished by them vide Ex.P.221 to 227 on 11.5.2001 under Sec.27 of the Evidence Act and the site of occurrence was got verified on 12.5.2001 vide Ex.P.102 in the presence of motbirs Shantilal and Dadam Chand, which has been proved by Shantilal (PW 32). Likewise, these accused also pointed out the place vide Ex.P.103, where they kept the tractor and after committing dacoity, went in the tractor in pursuance to the information furnished by them vide Ex.P.228 to 234, which has been proved by Basantilal (PW 33) alongwith the investigating officer. No specific question by pointing out the accused, has been asked in the cross examination from witness Tara Chand (PW 14), Nirmala (PW 23), Saddam Bai (PW 24) and Munni Bai (PW 51), who identified the accused in the dock.

18. One of the reasons for disbelieving the test identification parade, which has been argued by the learned counsel, is that the only time 9.00 A.M. has been written in all the memos. Mentioning of the same time is not fatal because when the application for identification parade was moved to the magistrate viz; Shri Ajay Kumar Sharma (PW 37), he conducted the

identification parade on 4.5.2001 and mentioned the time "9 A.M." when it was conducted in the District Jail, Pratapgarh. He also mixed eight similar persons of the same identity. The list of the persons who were mixed with the accused, had been shown in Ex.P.114 to 120. It is not obligatory on the part of the magistrate to mention specific time of conducting the identification parade of each accused, when more accused are put for identification parade in the jail. Normally putting the time of initial conduct of parade, cannot be termed as fatal to the prosecution in conducting test identification parade. Likewise, it is not always necessary to call the independent witnesses during identification parade, which is conducted under Rule 70 of the General rules (Criminal) read with Section 164 CrPC, wherein statement is recorded by keeping necessary precautions by the magistrate, which he (Ajay Kumar Sharma, PW 37) has taken. Therefore, the contention of the learned counsel that accused were not `Baparda' is also not fatal in the light of statement of Amar Singh (PW 58), the investigating officer, who moved the application Ex.P.266 before the magistrate in which reference has been given of keeping accused in `Baparda' as also in arrest memos Ex.P.154 to 160. In this way, the identity of the accused appellants by the witnesses has been established by the prosecution through test identification parade as well as in dock identification.

TEST IDENTIFICATION OF ORNAMENTS:

19. The test identification regarding the ornaments which were said to have been stolen from the scene of crime, was conducted by the magistrate Shri Ajay Kumar Sharma (PW 37) on the application of the S.H.O. (Ex.P.272 dated 6.7.01 and the test identification parade of ornaments was conducted on 12.7.01 vide Ex.P.11 to 16 from the witnesses viz; Suresh Chandra, Ganga Bai, Shiv Ram, Nanu Ram, Deu bai and Sangeeta in which they identified the articles. Three similar articles were mixed by the magistrate during the test identification. One of the witnesses of identification who has been cross examined is Sav Ram (PW 3). The general questions have been put to him that such types of ornaments are available in the market. He has not denied the contents of the identification parade in the cross examination. Another witness of identification is Suresh (PW 13). No question has been put to him in the cross examination with regard to test identification of ornaments. Nanu Ram (PW 29), who has identified the ornaments, has been asked only one question in the cross examination that whether he has pointed out the details of ornaments to the police or not, to which he replied that he did not know. Smt.Ganga Bai (PW 43) has also supported the identification parade conducted in the jail but only question put to her in the cross examination is that whether she

knew the weight of the ornaments or not , to which she said that she cannot say anything about the weight. Sangeeta (PW 50) has identified her ornaments in the court and in the cross examination, the only question put to her was about the weight and design. Smt.Munni Bai alias Dev Bai (PW 51) ofcourse has not identified the ornaments in the court. In this way, the test identification parade of the ornaments conducted by the magistrate before the witnesses, whose ornaments were stolen, has been established.

20. Learned counsel has relied upon certain citations on the evidentiary value of test identification, referred below, which are distinguishable from the facts of the present case:

In Dhonkal Singh's case [supra (i)] relied upon by the learned counsel for the appellants, the test identification parade was disbelieved because the accused who were in the lock up, were not kept “baparda” and they were going out from the lock up for ease etc., whereas in the present case, as discussed above, it is clear from the evidence of Amar Singh (PW 58) recorded on 31.7.2004 that right from the date of arrest till the identification parade was conducted, the accused were kept `baparda' and instructions were given to the jail authorities to keep them in `baparda';

The second case of test identification parade is Gul Singh's case [supra (ii)] in which it was held that number of articles mixed, should not be small like two to three. In our view, this differs from case to case because normally, it is very difficult to get the small articles which are worn by the villagers from the vicinity or the market. In every article, the wearer keeps his or her own desired design and if three articles of the similar nature are mixed, it does not destroy the evidentiary value of the test identification parade of ornaments;

In Moti's case [supra (iii)], it was held that if the incident occurred at a place, where there was no proper light to identify the accused, this fact contributed to the doubt in the prosecution case. In the referred case, the murder was said to have been committed at 9.30 P.M. when the deceased and his father in law were sitting outside the house and the ladies were cooking food. Stomach was empty and necessary impression which can be drawn, was that incident took place prior to dinner, when the appellants came with lathis and spear and inflicted blows, where motive was absent, whereas the present case is based on strong motive of dacoity. So far as the light is concerned in the referred case, there was no proper light to identify the accused and it was difficult to ascertain the time of occurrence but in the present

case, the incident took place on 19.3.2001 i.e. "Chaitra Krishna Paksh 10. Of course, this was a dark night and moon was visible as per the "Panchang" around 12.00 in the mid night but the evidence of the case shows that there was light in the village on that day. In this regard, if we turn to the evidence of Sav Ram (PW 3), eye witness, he has stated that there was light in the village and there is no cross examination on this point from him. Hiralal (PW 4) has also stated that there was light but no question has been put to him in the cross examination that he was stating wrong in this regard except his statement Ex.D.1 in which he has said nothing about the light. Smt.Madhu (PW 5) also stated that there was light in the house. Nand Ram (PW 21) has stated that he switched off the light and there is no cross examination with him on this point. Devilal (PW 27) has stated that on the date of incident, he was watching T.V. and there is no contradiction on this point with him. Nanu Ram (PW 29) has stated that he used torch and the assailants also used the same but merely by showing torch, it cannot be said that there was no light in the Village because use of the torch by this witness is at the time when then accused was trying to break open the door of the house and it is not necessary that on the door, there should be a proper light. In this way, the eye witnesses have said that there was a light in the village at the time of incident.

RECOVERIES:

21. When the identity of the accused and ornaments have been established, now it is to be seen how the prosecution has been able to connect the accused with stealing these ornaments by committing dacoity and murders. On this vital issue, the most important evidence is that of recovery, which is said to have been made after arrest of accused appellant on 1.5.01 vide Ex.P.154 to 160.

RECOVERY OF WEAPONS:

22. Amar Singh (PW 58), the then S.H.O., Pratapgarh, stated that during the course of investigation, he came to know that on the night of 19.3.2001, the dacoity and murder were committed by "Kanjars" of village Tokda falling under the jurisdiction of Police Station, Gangdhar of District Jhalawar. Upon this, he alongwith Additional Superintendent of Police and police force, went to search the accused and on 1.5.2001, they arrested the accused appellants vide Ex.P.154 to 160. The accused were sitting in the pits surrounded by bushes on the bank of Kshipra

river. The recovery of weapons was made in pursuance to the information furnished by the accused-appellants on the spot in the presence of witnesses Bharat Singh (PW 46) and Lal Singh (PW 44), who have in their statements proved the arrest memos and recovery memos of weapons but they have not identified the accused persons. They have stated that these recoveries were made on the bank of Kshipra river, where the accused were sitting in a pit. Though Bharat Singh (PW 46) has not identified the weapons but Lal Singh (PW 44) has identified `kulhari' and `dharia' and there is no cross examination on this point to rebut their testimony with regard to recovery of weapons. As per the recovery memo, these recoveries were made in pursuance to the information furnished by the accused. As per the information of accused Sohaniya Ex.P.242 recovery of 12 bore rifle and 11 cartridges was effected vide Ex.P.162; accused Fatehlal furnished information Ex.P.243 and in pursuance thereof, one axe was got recovered from him vide Ex.P.164; accused Khshaliya furnished information Ex.P.244 and in pursuance thereof, one `dharia' was recovered vide Ex.P.163; accused Ratadia furnished information Ex.P.245 and in pursuance thereof, one 12 bore rifle and 8 cartridges were recovered vide Ex.P.165; accused Sunder gave information vide Ex.P.246 and in pursuance to this, one gun was recovered from him vide Ex.P.166; accused Nahar singh furnished information Ex.P.247

and in pursuance thereof, one 12 bore rifle and 9 cartridges were recovered vide Ex.P.167; and accused Lal chand furnished information Ex.P.250 and in pursuance thereof, one 12 bore rifle and 10 cartridges were recovered from him vide Ex.P.161.

23. It has been contended by the learned counsel for the appellants that Amar Singh, S.H.O., had stated in his statement that the accused were arrested alongwith weapons from a pit surrounded by bushes on the bank of Kshipra river, therefore, it cannot be believed that the recovery was made in pursuance to the information furnished by them under Section 27 of the Evidence Act and there is no signature of any witness on the information furnished by the accused. It is true that the information furnished by the accused regarding possession of weapons, has not been recorded in the presence of witnesses but the time of arrest, information and recovery are almost coincidental with the operation of arrest. The arrest memos Ex.P.154 to 160 reveal that arrests were made between 8.45 AM to 9.15 AM and informations were furnished between 9.45 AM and 10.05 AM and the recoveries were made between 10.25 AM to 11.00 AM, therefore, in this operation of two hours, when the arrest, information and recoveries have been made, then the statement of the investigating officer that the accused were hidden in a pit surrounded by bushes on the bank of Kshipra

river is a natural statement, corroborated by the witnesses of recovery and the version of the investigating officer has been supported by a superior officer viz; Govardhan Lal Meena, Addl.S.P. (PW 57) who has stated that the accused were named before arrest and on making extensive enquiry, accused told them that they are having weapons in their possession, which were recovered in pursuance to the information furnished by them. The contention of the learned counsel for the appellants is that the weapons were hidden in the pits and there were no dust spots on it, therefore, the recovery is fake and cannot be accepted because after lapse of time and even at the time of recovery of articles, still it is quite natural that the soil is cleaned. In this way, the finding of the learned trial court regarding recovery of weapons of offence in pursuance to their information & from the possession of the accused, does not call for any interference.

RECOVERY OF OPIUM AND ORNAMENTS:

24. It has been stated by Amar Singh (PW 58), the investigating Officer that while accused were under arrest, they furnished information on 8.5.2001 to him regarding the recovery of opium and ornaments, which were plundered from the scene of the occurrence by them. Since the information was furnished

regarding the recovery of opium, therefore, notices were issued to all the seven accused appellants on 9.5.2001 required under Section 50 of the Act of 1985 and by calling motbirs Samrathlal and Devilal, recoveries were made. Though Devilal son of Onkarlal has not been produced and Samrathlal, motbir (PW 42) has turned hostile but these recoveries of opium and ornaments have been proved by Amar Singh (PW 58), the investigating officer and his superior officer Govardhan Lal Meena, Addl.S.P. (PW 57). According to the investigating officer, accused Sohaniya furnished information Ex.P.248 and notice was given to him vide Ex.P.153 and recovery of 6 kgs. of opium and 8 items of ornaments including one watch, was made from him vide Ex.P.138. Accused Ratadia furnished information Ex.P.248A and notice was given to him vide Ex.P.141 and recovery of 5kg. Opium and 8 ornaments including one watch, was made from him vide Ex.P.142. Accused Sunder furnished information vide Ex.P.251 and notice was given to him vide Ex.P.144 & recovery was made vide Ex.P.145 of 3.500 kg. opium and 8 items of ornaments including one lady watch. Accused Kushaliya furnished information Ex.P.252 and in pursuance thereof, notice was issued to him vide Ex.P.146 and recovery of 3 kg. opium and 4 items of ornaments, was made vide Ex.P.147. Accused Fatehlal furnished information vide Ex.P.253 and in pursuance to this, notice was issued to him vide Ex.P.148 and recovery of 3

kg. opium and 4 items of silver ornaments was made vide Ex.P.149. Accused Nahar Singh furnished information Ex.P.254 and in pursuance to this, notice was issued to him vide Ex.P.239 and recovery of 2kg. opium and 4 items of ornaments were recovered from him vide Ex.P.143. Likewise, accused Lal Chand furnished information vide Ex.P.255 and in pursuance to this, notice was given to him vide Ex.P.139 and recovery of 4.500gms opium and 7 items of ornaments including one watch, was made from him vide Ex.P.140.

25. The sealed packets of opium samples were sent for chemical examination to the F.S.L.,Jaipur vide letter of the Superintendent of Police Ex.P.257 alongwith the sample of seal impression vide Ex.P.260, which were deposited in the Malkhana vide Ex.P.120 in pursuance to Section 55 of the Act of 1985 alongwith the letter Ex.P.240 sent to the superior officer in compliance of Section 42 of the act and after recovery, the information was given to the Superintendent of Police on 10.5.2001 in compliance of Section 57 of the Act of 1985 vide Ex.P.264. As per the report of the F.S.L. Ex.P.262, the samples of seized opium marked A-1 to G-1 contained dark brown coloured solid substance and gave positive test for the presence of chief constituents of coagulated juice of opium poppy having 4.18%, 8.17%, 8.74%, 6.46%, 4.75%, 9.60% and 7.03%

morphine respectively. Learned counsel for the accused appellants has submitted that these samples were not taken as per standing order No.1/89 dated 13th June, 1989 issued by the Government of India, Ministry of Finance, Department of Revenue. In this notification, it has been stated that the quantity to be drawn for the purpose of sampling of opium, must not be less than 24 gms. Here, in the present case, the quantity of sample has been taken 50 gms for keeping two sealed packets. As per the report of the F.S.L. Ex.P.262, the samples were properly sealed and impressions on it, were tallied with the specimen seal impression forwarded, which were intact. Ofcourse, there was some variation in the weight of the opium because of loss of moisture contents. Learned counsel submitted that morphine should not be more than 0.2% but in the present case, it was more than so, as is evident from the report Ex.P.262. In this regard, the learned trial court has rightly discussed at page 73 of the judgment about the contents of percentage of morphine required under Section 2(15) of the Act of 1985 that the contents of morphine varies in different parts of cultivation of opium. It has rightly held that the defence has not been able to contradict the version of the prosecution with regard to mixture of any other substance in the buckets in which opium was found and recovered because further this opium was recovered from the cultivators of the opium.

26. The pronouncement cited by the learned counsel in Gab Singh's case [supra (iv)] is not applicable to the facts of the present case. In that case, the poppy husk was recovered on the information of the mukhbir (informant) and accused voluntarily surrendered and the report of the `mukhbir' was not held to be admissible in the evidence and, consequently, the accused was released on bail. In this way, the finding of the learned trial court with regard to presence of chief constituent of coagulated juice of opium is based on the F.S.L.Report Ex.P.262 and the compliance of provisions of Sections 42, 50, 55 and 57 of the Act of 1985 has been substantially made, specially when while investigating the case of dacoity and murder, the then S.H.O., Pratapgarh, Amar Singh (PW 58) arrested the accused appellants in a different district and recovered the weapons of offence, stolen ornaments and opium upon the information of the accused furnished u/s.27 of the Evidence Act;

27. According to the investigating officer, he also took footprints of all the seven accused appellants vide Ex.P.106 to 112 and also obtained piece of `shawl' from the spot produced by Dinesh vide Ex.P.32. Another piece of which was recovered from accused Ratadiya vide Ex.P.142. They were sent for chemical examination vide Ex.P.213, result of which was

received from the State F.S.L. vide Ex.P.256 in which it was stated that the torn ends of both the `shawl' pieces matched physically. The blood stained clothes, soil and controlled soil (Ex.P.30 & 31) alongwith empty cartridges (Ex.P.33) and the foot impression moulds (Ex.P.34 to 37), which were taken from the spot, were also sent by the Superintendent of Police vide Ex.P.257 to the F.S.L., Jaipur from where the report came vide Ex.P.258. As per the report of the Finger Print Bureau, the chance foot impression of mould marked D1 was similar to the specimen right foot impression marked-C of Sunder; the chance foot impression of mould marked D2 was similar to specimen left foot impression mould marked-B of accused Fatehlal; the chance foot impression of mould marked D3 was similar to the specimen right foot impression of mould marked-G of Sohaniya; and the chance foot impression mould marked D4 was similar to the specimen left foot impression mould marked-F of Kushaliya.

28. Any recovery which has been made in pursuance to the information furnished by the accused under Section 27 of the Evidence Act, is admissible in evidence and is a sufficient proof of the guilt of the accused by virtue of Section 114 of the Indian Evidence Act and its illustration (a). Section 114 deals with presumption with regard to existence of certain facts, which have happened, regard being had to the common course of

natural events, human conduct etc. Illustration (a) of this Section provides as under:

> "The Court may presume-
>
> (a) that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

29. The words "soon after" occurring in this illustration has a wide connotation. It depends upon the evidence, direct or circumstantial of each case. This presumption can be drawn only when there is a prima facie proof of its stealing. Though there are various pronouncements of the Hon'ble Apex Court that such recovery should be made without any span of delay but when the accused are absconding and recoveries have been made one after the other, when the accused had been arrested, it was not held to be fatal. When the accused is charged with the dacoity and murder, which is of a triple nature as in the present case and he is arrested after a lapse of 40 days after extensive search and recoveries are made in pursuance to the information furnished by him under Section 27 of the Act and it is proved that the recoveries were of the stolen property and of the weapons which were used in the commission of crime, the Court will certainly presume the existence of fact of dacoity and

murder by virtue of Section 114 illustration (a) of the Act and such recoveries are held to be proved against the accused even if they are given to the police officer in pursuance to an information furnished by the accused while he was in custody of the police. Section 27 is an exception to Section 26 of the Act which prohibits confession to the police officer.

30. The words "distinctly relates to the fact thereby discovered" appearing in Section 27 of the Act, denote that the information must be sensible or comprehensible and the recovery of articles has to be proved to the extent the words used by the accused in his information to the police while he was in custody. The basic idea enshrined in Section 27 of the act is the doctrine of confirmation by subsequent events. This doctrine is founded on the principle that the discovery is a guarantee of truth on the basis of the information furnished by the accused. The recovery of weapons used in the commission of crime, ornaments and opium plundered from the houses of deceased during investigation on the basis of a voluntary statement of the accused has a strong evidentiary value in the criminal trial. The facts which have emerged from the present case, it is clear that there was no previous enmity of the deceased and the accused who were of the distinct districts; the motive of the accused appellants was of committing dacoity and after extensive search,

the police arrested them. It can safely be said that the recovery was voluntary and genuine and the contention of the learned counsel that motbirs of recovery were not taken from the vicinity, is devoid of force in the circumstances of the present case because the witnesses of recovery of weapons on 1.5.2001 are of village Salarpura and they went with the police of Pratapgarh and in their presence, the accused were arrested and recovery was made of weapons by them in the commission of crime. The non-examination of Ballistic Expert is also not fatal to the prosecution case because these weapons were examined the State F.S.L., which is admissible under Section 293 CrPC and this report says that 12 bore rifle and cartridges are serviceable firearms. Mere non-examination of the expert, whose evidence is of corroborative nature, is not fatal to the prosecution unless truthfulness of the report has been questioned by the defence, which has not been questioned in the present case.

31. Likewise, the recoveries of opium and ornaments have been made in the presence of witnesses Samrathlal and Devilal, who are residents of village Manpura, Police Station Pratapgarh. Samrathlal (PW 42) is a hostile witness but Devilal (PW 47) has supported the recovery memos Ex.P.138 to 150, in which he has clearly stated that the accused were with the police at the time of recovery and nothing has come out from the cross

examination of this witness that the recovery is false. The authorities cited by the learned counsel for the appellants in this regard are distinguishable from the facts of the present case.

In Nachhettar Singh's case [supra (v)], the guilt of the accused was not held to be proved because of shaky and doubtful evidence and the witnesses of recovery were not examined. There was delay in despatching firearms to the Ballistic Expert, who said in his report that the empty cartridges were not fired from the gun recovered and there was no injury on the body of the deceased of firearm. The investigating officer was unable to explain to the court regarding arrest of the accused, who were residents of nearby to the place of occurrence. In the present case, the accused are of different districts and as per the version of Dr.Vimal Chandra Gandhi, who conducted the post mortem of deceased Nirbhay Ram and Dr.Rahul Jain (PW 56) who conducted the post mortem of deceased Chain Ram and Prakash have clearly stated in their examinations that the injuries on the bodies of deceased were caused by firearms;

In Bharat's case [supra (vi)] , the recovery of ornaments was not held to be reliable because the ornaments were not properly identified by the witnesses, whereas as discussed

above, that is not in the present case and witnesses have rather identified their ornaments in the court;

In Harjit Singh's case [supra (vii)], the recovery of crime weapons concealed in an open field in a gunny bag under a heap of straw on the basis of disclosure statement of accused, was not held to be reliable and because of not procuring attendance and signature of the independent witnesses on the disclosure statement, the memorandum was signed only by the police officers but in that case, the alleged place of concealment was accessible to the public, whereas in the present case, the dacoity has been committed by breaking houses;

The same principle was laid down by the Hon'ble Apex Court in Salim Akhtar alias Mota's case [supra (viii)] but in that case also, the recovery was made from the open place, which was accessible to all and everyone and recovered pistol was not sealed on the spot and there was no mention of its number or make in the recovery memo, whereas the recoveries in the present case have been made in the presence of independent witnesses, those articles were sealed on spot and the place was also not open;

In Prem Prakash Mundra's case [supra (ix)], the dead body

was recovered on the information of the accused. That was a case of circumstantial evidence and it was held that the statement of the investigating officer is not reliable. In that case, the accused was not held guilty because the only conclusion that could be drawn from the statement of the accused was that he knew the place where the dead body was buried and he did not state that he had buried it, therefore, he should not be connected with the offence on the basis of this circumstance;

In Bhugdomal Gangaram's case [supra (x)], the police officer acted on the information that certain accused would be following in taxi, a truck carrying prohibited liquor. In that case, the informant was not examined. But the present case is not based on the information of other persons except the accused and the recovery is effected in pursuance to the information furnished by the accused, admissible under Section 27 of the Act, which is not fatal to the prosecution case, as it raises strong presumption of fact leading to discovery which is admissible under Section 114 of the Act.

32. Thus, after scrutinizing the evidence in the above light, we confirm the finding of the learned trial Court that the accused appellants named above, in order to commit dacoity, went to the Village Dhanesree, Police Station Pratapgarh, District Chittorgarh

on the night of 19.3.2001 armed with firearms, axe, dharia etc. and plundered ornaments and opium by breaking open the houses of Chain Ram, Nirbhay Ram and Nanu Ram and killed Nirbhay Ram, Chain Ram and Prakash. Their acts are established from their criminal intention supported by the testimony of eye witnesses, test identification, recoveries i.e. opium, ornaments, firearms, cartridges and piece of "Shawl" and moulds of footprints taken by the police.

33. Now, what is to be seen is that whether the conviction and sentences awarded by the learned trial Judge for the acts committed by the accused appellants, are in conformity with the law or not. As discussed above, in the absence of evidence of x-ray plates and also grievous injuries, the offences u/ss.325 and 326 PC are not made out. For rest of the offences, if we turn to the evidence on record with regard to criminal conspiracy punishable under Section 120B IPC and common object punishable under Section 149 IPC, learned trial court has held that it is not proved from the evidence that the accused came in a tractor trolley of accused Balwant Singh and consequently, accused Balwant singh was acquitted by the trial Court. There is also the evidence that accused Sohaniya and Lal Chand came in the village two days before the incident on motor cycle but this evidence has not been corroborated by any of the eye witnesses.

In the absence of this evidence, we are unable to arrive at a conclusion as to how the accused appellants are guilty of the offence under Section 120B IPC, which deals with the criminal conspiracy.

34. In order to prove the element of criminal conspiracy as defined under Section 120A IPC, the illegal act is committed by two or more persons under the agreement and some act is done by one or more of them in pursuance to such agreement. This definition denotes that there must be a pre-plan in accomplishment of the object. There must be an element of unlawful combination by some overt act or an act to accomplish it. A meeting of mind of the partners of an illegal act must be established. In the present case, there is no direct or circumstantial evidence that there was a pre-meeting of the mind for committing an illegal act. Of-course, the informations furnished by the accused appellants vide Ex.P.224 to 236 regarding the place of dacoity and weapons used in the commission of crime and opium and ornaments vide Ex.P.242 to 248A and Ex.P.250 to 255 reveal that they are regarding recovery of the articles. There is no link evidence of using tractor trolley or motor cycle prior to two-three days of incident, to establish the charge of criminal conspiracy. In the absence of it, the charge under Section 120B IPC cannot be sustained.

35. So far as the charge of common object punishable under Section 149 IPC, undoubtedly, the accused appellants were more than five in number and were armed with deadly weapons. This is the law on vicarious liability for the unlawful acts committed in pursuance to the common object by any other member of the assembly. The basis of this constructive liability is the requisite common object acknowledged. "Conspiracy" is distinguished from "common object" of composition of assembly. The common object can be collected from the nature of the assembly, its behaviour and at or before or after the scene of the incident and the nature of the arms used, therefore, here, in the present case as is evident from the record, the object was to commit dacoity and murder by a gang. The common object does not require a prior concert or a common meeting of mind as is required for a common intention punishable under Sec.34 IPC. To constitute the offence punishable under Sec.149 IPC, it is sufficient that the object of each of the member of assembly was same and the number is five or more and they act to achieve that object. In the present case, there was an element of common object of unlawful assembly of accused appellants, which has rightly been discussed by the learned trial Judge with the help of law laid down by the various judgments of the High court and Hon'ble the Supreme Court and we uphold it.

36. Since the accused have been held guilty under Section 396 IPC, which punishes dacoity with murder, there is no need to convict and sentence them under Section 395 IPC, which provides punishment for dacoity alone. So far as Section 397 IPC is concerned, as has been discussed above, no charge under Sections 325 and 326 IPC relating to grievous hurt, has been proved, therefore, the guilt under Section 397 IPC cannot be sustained, as it deals with the robbery or dacoity with attempt to cause death or grievous hurt for which there is no separate evidence except committing murder for the purpose of dacoity for which appellants have been found guilty under Section 396 IPC. Likewise the charge of Section 458 IPC dealing with lurking house-trespass or house-breaking by night after preparation for hurt, assault, or wrongful restraint, has been established. Since the accused were jointly concerned with the lurking house-trespass or house-breaking by night, whereby death was caused, the act is punishable under Section 460 IPC but it is not so punishable in the absence of proof of grievous hurt punishable under Section 459 IPC. Since the property has been plundered and recovery has been made, therefore, the punishment under Sections 148 and 380 IPC is also sustainable alongwith the offences of causing simple injury by blunt & sharp weapons punishable u/ss.323 & 324 IPC and of murder punishable under

Section 302 IPC and keeping contraband opium punishable under Section 8 read with Sec.18 of the Act.

37. In view of the above, while the conviction of accused appellants for the offences u/ss.148, 396, 458 or 458/149, 460 or 460/149, 380 or 380/149, 323 or 323/149, 324 or 324/149, 302 or 302/149 and Section 8/18 of the Act is maintained but their conviction recorded under Secs.120B, 395 or 395/149, 397 or 397/149, 459 or 459/149, 325 or 325/149 and 326 or 326/149 IPC can not be maintained.

DEATH PENALTY:

38. Coming to the part of sentence awarded to accused appellant Sohaniya, who has been sentenced to death and to pay a fine of Rs.1000/- and about rest of the accused, who have been sentenced to imprisonment for life and to pay a fine of Rs.5000/- and in default, to further undergo one year's S.I., the reasons assigned for sentencing the accused Sohaniya under Section 396 IPC are; firstly that he has been previously convicted in a murder case of Jhalawar on 10.2.2003 to which the learned counsel for the accused appellant Sohaniya has submitted that the appeal is pending before the Division Bench of this Court at Jaipur Bench. There is no contrary argument

advanced by the learned Public Prosecutor in this regard. The second reason assigned by the learned trial Judge is that accused Sohaniya was the leader of the gang and he played the prime role in committing the dacoity, by relying upon the case of Nirmal Singh vs. State reported in 1999(1) CrLR (SC) 360 in which it was held that the personal role played by the accused should be considered while awarding the death sentence. Thirdly, some more cases of dacoity and attempt to murder are pending against the accused and he is a leader of dacoits from whom opium in more quantity was recovered. We are unable to subscribe-to the view of the learned trial Judge, because the acts of the accused Sohaniya and six other accused appellants are of the similar nature and no evidence has come on record that he planned dacoity. To bring it a case under the caption "rarest of rare", mere previous conviction is not enough to hold the accused guilty. Even when offence in the present case was committed, the accused was not a life convict. The constitutionality of imposing death sentence on a life convict under Section 303 IPC was struck down by the Hon'ble Supreme Court in Mithu Singh v. State of Punjab reported in AIR 1983 SC 473 and thereafter in other cases. In our view, merely because one kilogram more opium was recovered from the possession of accused Sohaniya and is a gang leader against whom many cases are pending, cannot be a cognate reason for the extreme

penalty. Further, Section 396 IPC is punishable with death or imprisonment for life or rigorous imprisonment for a term, which may extend to ten years, whereas Section 302 IPC is punishable with death or imprisonment for life, a more serious offence than one under Section 396 IPC. When under Section 302 IPC, the learned trial Judge has awarded the imprisonment for life, then there is no reason as to why the accused Sohaniya has been sentenced to death under Section 396 IPC, which is also punishable with rigorous imprisonment with a term, which may extend to ten years.

39. There is a much debate on the question of imposition of death penalty, which is codified under the Indian Law in contrast to the European Countries. Without going into this debate, death penalty is imposed only when the criminal act of the accused is so extreme, which shakes the conscience of the Society and is so brutal that it threatens the life and liberty of free citizens of a Republican State. In a large democracy, where majority are poor and have no means of livelihood and there is no guarantee of employment, the nature & conduct of human beings is that they indulge in unfair means for bread and the surrounding Society of life and nature takes them to extreme act of brutality like animals. Looking to the totality of the evidence collected in this case, it is a case of similar nature, where the gang of small or bit

number living on the banks of rivers of Chambal, Kshipra etc., which are popularly known areas of dacoits, has committed this crime. Many of big dacoits of these areas have surrendered and the State has granted them clemency in the past on their surrender with the armed weapons. Some of them have turned their life to serve the Society and were later-on elected in the legislative bodies. Thus, the case of the present accused appellant cannot be termed as more heinous than that of those popular dacoits and their gang leaders.

40. In view of the aforesaid, we are unable to confirm the death sentence awarded to accused appellant Sohaniya upon re-appraisal of the entire facts and law.

41. Consequently, we answer the Murder Reference submitted under Section 366 CrPC by the learned Special Judge, NDPS Act Cases, Pratapgarh awarding death sentence to accused appellant Sohaniya in negative and while setting aside the death sentence for the offence under Section 396 IPC, we sentence him to imprisonment for life and to pay a fine of Rs.5000/- and in default, to undergo one year's simple imprisonment, as has been done in the case of other six accused appellants. We, however, allow the appeal being 9D.B.Criminal Appeal No.651/2005 filed by accused appellants Sohaniya and six others, in part; set aside

the conviction & sentences of all the seven accused-appellants recorded u/ss.120B, 395 or 395/149, 397 or 397/149, 459 or 459/149, 325 or 325/149 and 326 or 326/149 IPC; but maintain their conviction & sentences for the offences u/ss.396 (by converting death penalty of accused Sohaniya to life imprisonment and to pay a fine of Rs.5000/- & in default, to undergo one year's S.I.), 148, 458 or 458/149, 460 or 460/149, 380 or 380/149, 323 or 323/149, 324 or 324/149, 302 or 302/149 and Section 8/18 of the Act of 1985. Since, all the accused appellants are in jail, they will serve-out remaining part of their sentences.

(DEO NARAYAN THANVI), J. **(SATYA PRAKASH PATHAK), J.**

RANKAWAT JK, PS